IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.01.2007

CORAM

THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

S.A.NO.1276 OF 1997
AND
CROSS OBJECTION NO.72 OF 1999
AND
C.M.P.NOS.8038 OF 1998 AND 13034 OF 2000

SECOND APPEAL NO.1276 OF 1997:

1.Selvaraj (died)
2.Rajesekaran
3.Gunasekaran (died)
4.Lakshmiammal
5.Kanakam
6.Minor Dharani
(rep. by mother guardian
Kanakam)
7.Rathnam
8.Minor Suresh
9.Minor Ramesh
(Minors respondents 8 and 9
rep. by mother and next friend
Rathnam)
(Appellants 4 to 6 and 7 to 9
brought on record as LRs of
deceased 3rd and 1st appellants
vide order dt.28.9.2000 in
CMP Nos.14333 to 14341 of 2000) .. Appellants

Vs.

Narayanan .. Respondent

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CROSS OBJECTION NO.72 OF 1999:

Narayanan .. Cross objector

Vs.

1.Selvaraj
2.Rajasekaran
3.Gunasekaran .. Respondents

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This second appeal has been preferred under Section 100 C.P.C. and the cross objection is filed under Order 41 Rule 22 r/w Order 42 Rule 1 and Section 108 C.P.C. against the judgment and decree

dated 23.7.1997 made in A.S.No.10 of 1997 by the learned Principal District Judge, Villupuram, which was preferred against the judgment and decree, dated 12.12.1996 made in O.S.No.84 of 1996 on the file of the learned Principal District Munsif, Kallakurichi.

For Appellants : Mrs.Hema Sampath, Senior Counsel
for Mr.R.Subramanian
in S.A.No.1276 of 1997
Respondents in
Cross objection No.72 of 1999

For Respondent : Mr.V.Raghavachari
for Mr.K.S.V.Sethuraman
in S.A.No.1276 of 1997
Cross objector in Cross Objection
No.72 of 1999

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COMMON JUDGMENT

This judgment shall govern this second appeal and the cross objection. The second appeal is filed by the defendants and the cross objection is filed by the plaintiff.

2.It was originally a suit filed by the plaintiff in O.S.No.484 of 1996, seeking for the relief of declaration, recovery of possession and for mesne profits. On trial, the suit was dismissed by the trial court. On rejection of the case of the plaintiff, an appeal was preferred by the plaintiff in A.S.No.10 of 1997. On enquiry of the appeal, the learned District Judge, Villupuram granted the relief in respect of declaration and recovery of possession and also granted mesne profits at the rate of Rs.6000/- per year. Aggrieved the defendants have brought forth this second appeal, while the plaintiff, aggrieved over the disallowed portion in respect of mesne profits, has brought forth cross objection.

3.The plaintiff filed the suit alleging that the properties originally belonged to one Kuppammal and Thangavel Gounder; that one Athiappa Gounder purchased the properties; that the said Athiappa Gounder executed power of attorney for maintenance of the same in favour of one Sengoda Gounder on 9.5.1979; that since the said Sengoda Gounder did not act properly, there was cancellation of power deed on 6.10.1986; that the said Sengoda Gounder filed a suit in O.S.No.17 of 1987 on the file of the Sub Court, Virudhachalam, claiming that he was entitled to the property and also for consequential reliefs; that it was dismissed; that he took it on appeal in A.S.No.174 of 1991 and the same was also dismissed; that the plaintiff has purchased the property under Ex.A.1 from Athiappan on 22.1.1992; that the possession of the property was not handed over; that after the appeal was over, the Sengoda Gounder died and his legal representatives took the matter by way of second appeal and under these circumstances, the plaintiff was constrained to file the suit for declaration, recovery of possession and also for mesne profits.

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4.The suit was resisted by the defendants stating that the property exclusively belonged to Sengoda Gounder; that it was purchased by him in the name of Athiappan as benami; that he has been in enjoyment of the property all along; that the execution of power of attorney and cancellation of the same were simply false; that from the time of purchase, the property has been in direct enjoyment of Sengodan family; that he has also prescribed title by adverse possession; that even proceedings were actually conducted on behalf of Athiappan only by Sengodan; that it is true, suit was filed, but both the suit and the appeal were dismissed; that the property continues to be with Sengodan and his family members and thus, the plaintiff was not entitled to the reliefs.

5.The defendants further contested stating that originally two suits were filed, one in O.S.No.130 of 1992 and the other in O.S.No.1047 of 1992; that the first suit was filed for declaration and injunction and in alternative recovery of possession; that the second suit was filed for declaration and injunction; that O.S.No.1047 of 1992 was withdrawn on 12.3.1993 even without permission to file the fresh suit; that O.S.No.130 of 1992 was withdrawn on 2.3.1993 itself with permission to file a fresh suit; that in these cases, originally the relief sought for was declaration; that the cause of action shows the date of purchase of the property; that the other reliefs sought for were injunction and in alternative recovery of possession and under these circumstances, the suit is hit by Order 23 Rule 1 C.P.C; that there was abandonment of suit and no permission was granted in the earlier suits, which were pending; that apart from that, while the cause of action was very well available, the plaintiff has not included the relief in the earlier suits and thus, he was prevented from filing the other suit and it is hit under the provisions of Order 2 Rule 2 C.P.C and hence, the suit was to be dismissed.

6.The trial court framed necessary issues, tried the suit and dismissed the same in entirety. Aggrieved the plaintiff took it on appeal and on the points determined by the first appellate court, the judgment of the trial court was reversed and the relief of declaration and recovery of possession was ordered along with mesne profit at the rate of Rs.6000/- per year. Aggrieved the defendants took it on second appeal, while the plaintiff, aggrieved over the disallowed portion as to the mesne profit, has filed the cross objection.

7.At the time of admission, the following substantial questions of law were formulated by this Court:

> "1.Whether the lower appellate court has properly interpreted and applied the provisions of the Benami Prohibition Act?
>
> 2.Whether the plea of adverse possession set up in the instant case has been properly adjudicated as provided by law?
>
> 3.Whether the suit is barred by res judicata?"

8.Advancing his arguments on behalf of the appellants/defendants, the learned Senior Counsel would fairly concede that in the instant case, the claim to the property on the

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basis of benami transaction and also the claim by way of adverse possession are not pressed, but the learned Senior Counsel would press that the suit is actually hit under the provisions of Order 23 Rule 1 C.P.C and also Order 2 Rule 2 C.P.C.; that it is not in controversy that the plaintiff filed a suit in O.S.No.130 of 1992 on 5.2.1992; that it was a suit for declaration and injunction and in alternative recovery of possession; that the second suit was filed on 5.11.1992 in O.S.No.1047 of 1992; that it was also the suit for declaration and injunction; that O.S.No.1047 of 1992 was withdrawn on 12.3.1993; that there was no application for liberty to file a fresh suit either, or there was a grant for the same; that even before the withdrawal of O.S.No.1047 of 1992, O.S.No.130 of 1992 was withdrawn on 2.3.1993 itself with permission to file a fresh suit; that originally, O.S.No.62 of 1993 was filed before the Sub Court, Virudhachalam and it was transferred to the District Court, Kallakurichi and renumbered as O.S.No.484 of 1996; that a comparison of the cause of action of the three suits would clearly reveal that the suit is hit under the provisions of C.P.C.; that in all the cases, the date of purchase of the property, namely 22.1.1992, was actually mentioned; that in the first suit, it has been clearly stated that the possession of the property was handed over; that in the first suit, the reliefs of declaration and injunction and in alternative recovery of possession were asked for; that in the second suit, the reliefs of declaration and injunction only were asked for; and that in all the cases, it would be quite clear that they have been filed on the same cause of action.

9.Added further the learned Senior Counsel that from the very evidence of P.W.1, it would be quite clear that he knew the proceedings already pending between the parties and the possession was with Sengodan and thus, it would be indicative of the fact that when he purchased the property, he has also purchased the litigation; that when he deliberately filed the first suit for declaration and injunction, he should have asked for recovery of possession; that in all the cases, interim injunction was sought for and the applications were dismissed, on contest; that even in the first suit, alternative relief of recovery of possession was sought for, which would clearly indicate the fact that the said Sengodan was in possession of the property and even the same cause of action was also urged in all the suits; and that in all the three cases, the subject matter is also same.

10.The learned Senior counsel also relied on the following decisions in support of the case of the appellants:

(1)AIR 1970 SC 1059 (SIDRAMAPPA VS. RAJASHETTY AND OTHERS).

(2)1987 1 SCC 5 (SARGUJA TRANSPORT SERVICE VS. STATE TRANSPORT APPELLATE TRIBUNAL, M.P. GWALIOR AND OTHERS).

(3)AIR 1970 GUJARAT 73(LAXMIDAS RAMJI VS. SMT. LOHANA BAI SAVITA TULSIDAS AND OTHERS)

(4)1992 (2) MLJ 468 (A. HENRY AND ANOTHER VS. ST. GEORGE CHURCH).

(5)1981 R.L.T. 578.

Relying on the above decisions, the learned Senior Counsel would submit that in the instant case, in the case of abandonment without

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permission, such a second suit will not lie on the ground of public policy; that the public policy would also require that the plaintiff should not be allowed to file a fresh suit and thus, it is hit under the provisions of Order 23 Rule 1 C.P.C.

11.Added further the learned Senior Counsel that the first appellate court has not considered the same; that the contention put forth by the other side is that it is not necessary to obtain permission; that if it is accepted, any number of suits could be filed continuously, which is against the public policy; that in the instant case, there was cause of action available for getting the relief of recovery possession even in the suit in O.S.No.130 of 1992, but the plaintiff had not asked for and hence, it is hit by the provisions of C.P.C. and thus, the suit is liable to be dismissed and the same should not have been gone into legally by the first appellant court, but it has erroneously decided in favour of the plaintiff .

12.Insofar as the cross objection is concerned, the learned Senior counsel would submit that though the plaintiff claimed Rs.90,000/- per year, there was no evidence worth available from the plaintiff's side and that the first appellate court has ordered mesne profits at the rate of Rs.6000/- per year even without any evidence at all and under these circumstances, it has got to be set aside.

13.In answer to the above contentions, the learned counsel for the respondent would submit that in the instant case, it is true, originally, there was a suit filed in O.S.No.130 of 1992 for the relief of declaration, injunction and in alternative recovery of possession; that the second suit in O.S.No.1047 of 1992 was filed for declaration and injunction; that the second suit was withdrawn, but no liberty was asked for either, or granted; that O.S.No.130 of 1992 was also withdrawn, but liberty has been granted; that pursuant to the same, the instant suit has been brought forth; that it can be well stated that the present suit was filed on the permission granted by the Court; that if the appellants were really aggrieved for the grant of the relief, they should have agitated at that time; and that once permission was granted and the suit is now brought forth, it cannot be agitated and it is too late.

14.The learned counsel would further submit that in the instant case, the appellants cannot be permitted to say that it is a case where Order 23 Rule 1 CPC could be applied; originally, a suit in O.S.No.17 of 1987 was filed by one Sengodan, where he sought for declaration and the suit was dismissed and thereafter, he took it on appeal and even the appeal was also dismissed; that the other proceedings were initiated by the legal representatives of Sengodan by way of second appeal; that even assuming that the proceedings were initiated after the disposal of the second appeal at the instance of the legal representatives of Sengodan, the suit will stand; and that apart from that, in the instant case, the contentions put forth by the appellants' side have got to be rejected.

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15.The learned counsel for the respondent relied on a decision reported in AIR 1970 SC 987 (VALLABH DAS VS. DR.MADANLAL AND OTHERS), wherein it has been found that the suit cannot be found to be one hit under the provisions of Order 23 Rule 1 C.P.C, if the subject matter is found to be different and it is further observed that unless the cause of action and the relief claimed in the second suit are the same as in the first suit, it cannot be said that the subject matter of the second suit is the same as that in the previous suit; that when O.S.Nos.130 and 1047 of 1992 were filed, actually, the property was in possession of Sengodan; that both the courts below have clearly found that the relationship between Athiappan and Sengodan was not disputed; that actually the property was purchased by Athiappan; that the contention that it was a benami transaction and that it was purchased in the name of Athiappan has been rightly negatived; that the said Sengodan filed a suit seeking for declaration and on dismissal, he took it on appeal and the same was also dismissed; that the legal representatives of Sengodan filed second appeal; that there was a power of attorney executed by Athiappan in favour of Sengodan for maintenance of property; that since he has not properly managed, Athiappan cancelled the power of attorney, but at the same time, he has executed a sale deed in favour of the plaintiff; that it would be quite clear that the property was in the hands of Sengodan at that time and hence, there was a suit for declaration and injunction; that at the same time, it cannot be forgotten that the original owner was Athiappan and not Sengodan; that after coming to know that the suit in O.S.No.130 of 1992 was already pending, the suit in O.S.No.1047 of 1992 was not pressed; that no cause of action arose seeking for any permission, but O.S.No.130/1992 was concerned, when the relief was sought for, the appeal filed by Sengodan was also pending and he was also in possession of the property; that after his death, the legal representatives of Sengodan were very adamant and they continued to be in possession; that there arose a necessity seeking for recovery of possession; that in the instant case, not only cause of action, but also the subject matter has got to be gone into; that the subject matter is entirely different, as could be seen from the plaint and hence, the contentions put forth by the learned counsel for the appellants cannot be countenanced.

16.Added further the learned counsel that insofar as the other contention that originally, cause of action was available, seeking for recovery of possession also, but it was not asked for cannot also be countenanced for the simple reason that cause of action arose for recovery of possession only subsequently and under these circumstances, the appeal has got to be dismissed.

17.The learned counsel further made his submissions in respect of cross objection that there was a claim for Rs.90,000/- per year; that the property was to an extent of 21 acres and the property was in possession of the defendants for nearly two decades and there are 100 coconut trees also; that the first appellate court took a view that it is a fit case where mesne profits has got to be ordered by awarding a sum of Rs.6000/- per year, which is

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thoroughly unreasonable and it has got to be raised and what was asked for has got to be ordered.

18.The Court has paid its anxious consideration on the submissions made.

19.It was a suit for declaration, recovery of possession and for mesne profits. Though the suit was dismissed in entirety, the first appellate court, on appeal filed at the instance of the plaintiff, granted the relief of declaration and recovery of possession and also granted mesne profits at the rate of Rs.6000/- per year. The plaintiff claimed the relief of declaration on the strength of Ex.A.1, sale deed, which he obtained from Athiappan, the owner of the property, who has purchased the same from the original owner. The said fact was accepted by the first appellate court and rightly too. Insofar as the defence was concerned, the defendants raised a plea that first of all, the property, though purchased in the name of Athiappan, it was purchased by Sengodan and it was a benami transaction and the said Sengodan continued to be in possession of the property. The learned counsel for the appellants fairly concedes that the defence plea of benami transaction was not pressed.

20.The only point that arose for consideration in this second appeal, as could be seen from the submissions made, is whether the suit is hit in view of the provisions under Order 23 Rule 1 C.P.C. and also Order 2 Rule 2 C.P.C. It would be more apt and appropriate to reproduce Order 23 Rule 1 C.P.C., which reads as follows:

> "1.Withdrawal of suit or abandonment of part of claim:- (1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his Claim:
>
> Provided that where the plaintiff is a minor or other person to whom the provisions contained in Rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the court."

21.Admittedly, the plaintiff filed three suits. Originally, the first suit in O.S.No.130 of 1992 was filed on 5.2.1992 and it was for declaration, injunction and in alternative for recovery of possession. The second suit in O.S.No.1047 of 1992 was filed on 5.11.1992 for declaration and injunction. Admittedly, O.S.No.1047 of 1992 was withdrawn without getting any permission whatsoever. O.S.No.130 of 1992 was withdrawn with a permission to file a fresh suit. It is contended by the plaintiff that the present suit was filed on the permission granted by the Court in O.S.No.130 of 1992. At the outset, it must be stated that since permission was granted by the Court in O.S.No.130 of 1992 for filing a fresh suit, the present suit has been brought forth.

22.The next contention put forth by the appellants' side is that originally the suit was filed in O.S.No.130 of 1992 and the prayers for declaration, injunction and in alternative recovery of possession were asked for and on withdrawal of the same, the present suit has been filed for recovery of possession and thus, instead of abandoning the earlier suit, the plaintiff should have prosecuted the same and therefore, there was no necessity for abandonment and filing a fresh suit. At this juncture, the

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contention of the learned counsel for the respondent requires consideration. It is an admitted position that Sengodan has filed a suit in O.S.No.17 of 1987 seeking for the relief of declaration that it was a benami transaction and he purchased the property in the name of Athiappan. The suit was dismissed and he took it on appeal and the appeal was also dismissed. After dismissal of the appeal, Sengodan died. The legal representatives of Sengodan preferred second appeal and the same was dismissed. Thus, it would be quite clear that originally, Sengodan and on his death, his legal representatives have agitated that the property belonged to them on the basis of benami transaction, but it has been negatived.

23.Further, in the instant case, according to the plaintiff, Athiappan was the owner of the property. He executed power of attorney in favour of Sengodan and the said Sengodan was managing the property and there was a cancellation of power of attorney and in the earlier proceedings, it has been referred to. There arose a necessity for Sengodan to get the power of attorney from Athiappan for prosecuting the suit. Under these circumstances, it would be quite clear that the owner of the property was Athiappan and the said Sengodan was only managing the property and he was actually in possession of the property. While the suit was filed by Sengodan, pending matter, the property has been purchased by the plaintiff. He has also sought for declaration, injunction and in alternative recovery of possession. At this time, it has to be mentioned that originally, ownership of the property never went to Sengodan, but it remained with Athiappan. Therefore, the purchaser of the property had title, but could not get possession and thereafter, after coming to know that O.S.No.1047 of 1992 was unnecessary, it was withdrawn and there was no necessity for getting permission.

24.Insofar as O.S.No.130 of 1992 was concerned, it is true, it was withdrawn after getting permission to file a fresh suit. Following the permission from the Court, the instant suit has been filed. The test, which has got to be applied is whether the suit is hit under Order 23 Rule 1 C.P.C. From the reading of the decision of the Supreme Court reported in AIR 1970 SC 987, it would be quite clear that unless the cause of action and the relief claimed in the second suit are the same as in the first suit, it cannot be said that the subject matter of the second suit is the same as that in the previous suit. In the instant case, originally, possession was with Sengodan and it continued to be so. The plaintiff initially sought for declaration and injunction. Then, he filed a suit for recovery of possession and also for mesne profits. Thus, the earlier circumstance was the suit filed by Sengodan against Athiappan and that the same went upto High Court. Under these circumstances, no question of filing any suit for getting the relief would arise. Now, applying the test of the Supreme Court, as referred to above, the Court is of the considered opinion that in the instant case, not only cause of action to be compared, but also subject matter has got to be seen. After applying the same, the Court is of the considered opinion that the subject matters are different and hence, it is not a case where the Court could declare that the suit is hit under Order 23 Rule 1 C.P.C. In the instant case, it cannot, at any stretch of imagination, be stated that originally, there was possibility for adding recovery of

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possession. Since proceedings initiated by Sengodan was pending before the trial court and also before the first appellate court and it went up to second appeal, the prayer for recovery of possession could not be added at that time. Now, in the instant case, it has been asked for. Under these circumstances, the contention that the inclusion of prayer was one available, but not included at that time, cannot be accepted. It is not a fit case where the suit could be hit under Order 23 Rule 1 c.P.C. either, or Order 2 Rule 2 C.P.C. Under these circumstances, the only legal contention raised by the appellants' side before this Court, fails and hence, the second appeal fails and the same is dismissed. No costs. Consequently, connected CMPs are also dismissed.

25.Insofar as the cross objection is concerned, though there was a claim for Rs.90,000/-, it has not been ordered. It is true, the plaintiff has not adduced any evidence. Under these circumstances, taking into consideration the admission made by the defendants, it has been fixed at Rs.6000/- per year. It is true, the land has been in possession of the other party for more than two decades. The relief cannot be given without any evidence whatsoever. In the absence of any evidence and also taking into consideration the admission made by the defendants, the first appellate court was perfectly correct in ordering Rs.6000/- per year, which has got to be sustained. Hence, the cross objection is also dismissed.

26.Further, the Court heard the learned counsel for the appellants and also the respondent. The proportionate costs was actually ordered. The order of the lower court is modified that the proportionate costs, if anything paid in excess, has got to be adjusted in the mesne profits to be calculated by the court and the appellants are entitled to get back the same.

Vvk

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Asst.Registrar

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Sub Asst.Registrar

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To

1.The Principal District Judge,
Villupuram.

2.The Principal District Munsif,
Kallakurichi.

3. TheSection Officer, VR Section, High Court, Madras

+ One cc to M/s. Hemasampath, Advocate sr no. 1242
+ 2ccs to Mr. K.S.V. Sethuraman, Advocate sr no. 1161

JRG(CO)
NM(02.02.07)

S.A.NO.1276 OF 1997 AND
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